



U.S. Department of Justice

Immigration and Naturalization Service



OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



Public Copy

File: SRC 00 015 54273 Office: Texas Service Center

Date:

JAN 21 2000

IN RE: Petitioner:
Beneficiary:



Petition: Petition for Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(ii)(b)

IN BEHALF OF PETITIONER: Self-represented

Identify
prevent clearly warranted
invasion of personal privacy

INSTRUCTIONS:

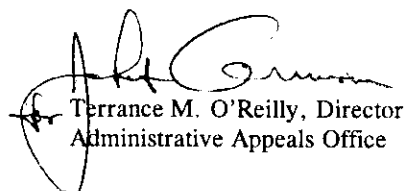
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center, and certified to the Associate Commissioner for Examinations for review. The director's decision to deny the petition will be affirmed and the petition will be denied.

The petitioner is a contractor. It desires to continue the employment of the beneficiary as a laborer for a period of one year. The petition was not accompanied by the required Labor Certification, ETA-750. The director determined that absent the certification, the petitioner failed to meet the regulatory requirements necessary for approval of the petition. The director certified his decision to the Associate Commissioner for Examinations for review.

In the director's decision, it stated that the petitioner seeks to continue employment for the beneficiary under the H-2A nonimmigrant classification as a temporary agricultural worker. The beneficiary is actually seeking an extension of his temporary stay as an H-2B nonimmigrant. However, the Service notes its authority to affirm decisions which, though based on incorrect grounds, are deemed to be correct decisions on other grounds within the power of the Service to formulate. Helvering v. Gowran, 302 U.S. 238 (1937); Securities Comm'n v. Chenery Corp., 318 U.S. 86 (1943); and Chae-Sik Lee v. Kennedy, 294 F.2d 231 (D.C. Cir. 1961), cert. denied, 368 U.S. 926.

The regulation at 8 C.F.R. 214.2(h)(6)(iv)(A) requires that a petition for temporary employment in the United States be accompanied by a temporary labor certification from the Department of Labor, or notice detailing the reasons why such certification cannot be made.

The petition was filed on October 15, 1999 without a temporary labor certification, or notice detailing the reasons why such certification cannot be made. Absent such certification from the Department of Labor or notice detailing the reasons why such certification cannot be made, the petition cannot be approved.

This petition cannot be approved for another reason. The petition indicates that the employment is a one-time occurrence. The regulation at 8 C.F.R. 214.2(h)(6)(ii)(B)(1) states that for the nature of the petitioner's need to be a one-time occurrence, the petitioner must establish that it will not need workers to perform the services or labor in the future.

The petition indicates that the dates of intended employment for the beneficiary are from September 1, 1999 until September 1, 2000. The job offered is that of a construction laborer. The petitioner states that the beneficiary is classified as a skilled laborer performing general duties, hand labor duties, small equipment

operation and minor management. Since the petitioner operates as a contractor, the duties to be performed by the beneficiary will be ongoing. The petitioner has not shown that the beneficiary's services are a one-time occurrence and will not be needed in the future. The petitioner has not established that the need for the services to be performed is temporary.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not met that burden.

ORDER: The director's decision to deny the petition will be affirmed. The petition is denied.